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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 UNITED STATES OF AMERICA,) No. CR 13-693 SI
14)
15 Plaintiff,) **UNITED STATES' RESPONSE IN OPPOSITION**
16) **TO DEFENDANT'S MOTIONS:**
17 v.)
18 ELIJAH COOPER,) **1) TO SUPPRESS WIRETAPS; AND**
19) **2) TO SUPPRESS EVIDENCE OBTAINED BY**
20 Defendant.) **PEN REGISTERS TRAP AND TRACE**
21) **DEVICES**

22 **I. INTRODUCTION:**

23 On September 26, 2014, Mr. Cooper filed his second volley of motions. Two of those motions –
24 Motion to Suppress Evidence Obtained by Pen Registers, Trap and Trace Devices and Motion to
25 Suppress Wiretaps – stem from confusion about the nature of pen registers. Because both motions are
26 rooted in the same misunderstanding, they are responded to here in one opposition.

27 **II. FACTS:**

28 On February 27, 2013, the government sought and received an order authorizing the installation
and use of a pen register on Mr. Cooper's phone – 415-410-9786. ¹ The order was issued by the

¹ A copy of the order is hereby provided for the Court's *in camera* review.

1 Honorable Maria Elena James, United States Magistrate Judge, Northern District of California. The
2 order requires the service provider to give the government call detail records for the preceding sixty
3 days.² The order expressly prohibits the investigative agency (in this case the Federal Bureau of
4 Investigation) from obtaining Global Positioning System (GPS) data about the location of Mr. Cooper's
5 phone.³ The order does allow the government to access cell site information,⁴ which is what Mr.
6 Cooper is now moving to suppress.

7 **III. DISCUSSION:**

8 As an initial matter Mr. Cooper's Motion to Suppress Wiretaps must be denied. He claims the
9 government was conducting "warrantless, unauthorized, electronic surveillance." This is simply not
10 true. The government applied for and received an order from Judge James. Pursuant to that order
11 received call detail records. The government then analyzed those records and the analysis is what Mr.
12 Cooper sites in his papers. There was no "electronic surveillance" or Mr. Cooper's phone that happened
13 between December 29, 2012 and February 27, 2013. There was an analysis of phone records which
14 were received pursuant to a court order.

15 Mr. Cooper's second motion – to suppress evidence obtained by pen registers, trap and trace
16 devices – is also without merit. Either by neglect or design, Cooper inaccurately describes GPS data.
17 GPS data, as the term is commonly used, refers to the location of a telephone as identified by a satellite.
18 That is not what has. What we do have is cell site data. That tells the government which cell tower is
19 providing service to a cell phone while the phone is making or receiving a call or text. 18 U.S.C.
20 § 2703 allows the government to get cell site information without a warrant. Mr. Cooper obliquely
21 relies on *United States v. Davis*, 754 F.3d 1205 (11th Cir. 2014) to argue that the government has
22 overstepped its bounds. Cooper recognizes that *Davis* has been vacated, but argues that it was a well-
23 reasoned decision. Of course the Eleventh Circuit did not seem to agree because the holding was
24 vacated, but even if it had not, *Davis* was never the law of the Ninth Circuit. Although the Ninth Circuit
25 has not yet addressed the issue, the Southern District of California has.

26
27 ² At 4:20-23.

28 ³ At 3:8-14.

⁴ At 4:26.

1 Although the Ninth Circuit has yet to consider a challenge to the constitutionality of § 2703(d)'s
2 standard for historical cell site data, the Third and Fifth Circuits have found that the lower
3 standard found in § 2703 withstands Fourth Amendment challenge. 620 F.3d at 317-318; *In re*
4 *Application of the United States of Am. for Historical Cell Site Data*, 724 F.3d 600, 614-615 (5th
5 Cir. 2013). This Court joins the Third and Fifth Circuits, as well as the majority of the courts to
6 address this issue, 908 F.Supp.2d at 211, in concluding that there is no "reasonable expectation
7 of privacy" in historical cell site data.

8 There is therefore no law that affords Mr. Cooper the relief he seeks from this Court. His second
9 motion - to suppress evidence obtained by pen registers, trap and trace devices – must also be denied.

10 **IV. CONCLUSION:**

11 Mr. Cooper's claim that the government was up to unauthorized surveillance is inaccurate. That
12 did not happen and Cooper's motion must be denied. Cooper's motion regarding cell site data is without
13 legal authority and must also be denied.

14 Date: October 24, 2014.

Respectfully Submitted,

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/s/

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